SUPREME COURT, U.S.
FILED
APR 2 9 2007
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No. 06-1416

In the
Supreme Court of the United States

VINCENT JAMES ACIERNO,

Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts have power to equitably toll the limitations period set forth in Section 405(c)(4) of the Social Security Act for disability benefit claimants whose disabilities, or other circumstances beyond their control, have prevented them from timely filing tax returns needed to establish their eligibility for benefits?

LIST OF ALL PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Vincent James Acierno, the petitioner herein, and Jo Anne B. Barnhart, Commissioner of the Social Security Administration ("SSA"), the respondent herein.

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Petitioner Vinc[illegible]ames Acierno respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 24, 2007.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 475 F.3d 77 (2d Cir. 2007). The opinion of the United States District Court for the Eastern District of New York, which is unreported, appears in the Appendix hereto. (A-13.) Also unreported and included in the attached appendix is the decision by Administrative Law Judge Peter F. Crispino, issued after a hearing, that became the final decision of the Commissioner of Social Security. (A-31.)

JURISDICTION

The Court of Appeals for the Second Circuit entered judgment in this action on January 24, 2007. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 405(c)(1)(B) of the Social Security Act provides:

> (c) Wage records
> (1) For the purposes of this subsection . . .
> (B) The term "time limitation" means a period of three years, three months, and fifteen days.

42 U.S.C. § 405(c)(1)(B).

Section 405(c)(4) of the Social Security Act provides:

(4) Prior to the expiration of the time limitation following any year the Commissioner of Social Security may, if it is brought to the Commissioner's attention that any entry of wages or self-employment income in the Commissioner's records for such year is erroneous or that any item of wages or self-employment income for such year has been omitted from such records, correct such entry or include such omitted item in the Commissioner's records, as the case may be. After the expiration of the time limitation following any year--

(A) the Commissioner's records (with changes, if any, made pursuant to paragraph (5) of this subsection) of the amounts of wages paid to, and self-employment income derived by, an individual during any period in such year shall be conclusive for the purposes of this subchapter;

(B) the absence of an entry in the Commissioner's records as to the wages alleged to have been paid by an employer to an individual during any period in such year shall be presumptive evidence for the purposes of this subchapter that no such alleged wages were paid to such individual in such period; and

(C) the absence of an entry in the Commissioner's records as to the self-employment income alleged to have been derived by an individual in such year shall be conclusive for the purposes of this subchapter that no such alleged self-employment income was derived by such

> individual in such year unless it is shown that he filed a tax return of his self-employment income for such year before the expiration of the time limitation following such year, in which case the Commissioner of Social Security shall include in the Commissioner's records the self-employment income of such individual for such year.

42 U.S.C. § 405(c)(4).

Section 405(c)(5) of the Social Security Act provides, in pertinent part:

> (5) After the expiration of the time limitation following any year in which wages were paid or alleged to have been paid to, or self-employment income was derived or alleged to have been derived by, an individual, the Commissioner of Social Security may change or delete any entry with respect to wages or self-employment income in the Commissioner's records of such year for such individual or include in the Commissioner's records of such year for such individual any omitted item of wages or self-employment income *but only* . . . .

42 U.S.C. § 405(c)(5) (emphasis added). This section then lists 10 exceptions to the filing requirement, none of which are relevant to this petition. The entire section is reproduced in the Appendix hereto. (A-39.)

STATEMENT OF THE CASE

Petitioner, Vincent James Acierno, a mentally disabled individual, seeks review of a Second Circuit ruling that denied his request that it equitably toll the Social Security Act limitations period for filing self-employment tax returns. That refusal rendered Mr. Acierno ineligible for social security disability benefits. The Second Circuit acknowledged that it was Mr. Acierno's disability that prevented him from timely filing his tax returns. (A-11.) But, despite evincing sympathy for Mr. Acierno's plight, it held that it lacked the power to toll the limitations period. (A-11.)

For reasons explained below, Mr. Acierno believes the lower court could and should have exercised its equitable powers to right this wrong. He urges this Court to grant a writ of certiorari and overturn the lower court's decision.

A. Regulatory Background

A claimant must qualify both as (1) "insured" and (2) "disabled" to qualify for social security disability insurance benefits. *See* 42 U.S.C. § 423(a)(1). A claimant who, like Mr. Acierno, becomes disabled after reaching age 31 qualifies as "insured" if he (a) would have been a fully insured individual if he had attained age 62 and properly filed his application for benefits, and (b) worked at least 20 of the 40 quarters preceding, and including, the quarter in which the onset of his disability occurred (the "20/40 Rule"). *See* 42 U.S.C. § 423(c)(1); 20 C.F.R. §§ 404.130, 404.131.

Satisfaction of the 20/40 Rule is based on a claimant's "Earnings Record," which the Commissioner of Social Security (the "Commissioner") develops from each claimant's tax returns. *See* 42 U.S.C. § 405(c)(2)(A). The Commissioner will include self-employment income from a given year in a claimant's Earnings Record only if the tax

return for that year was filed within the three years, three months, and fifteen days limitations period in 42 U.S.C. § 405(c)(4) ("§ 405(c)(4)"). *See* 42 U.S.C. § 405(c)(1)(B) (defining the limitations period). Section 405(c)(5) of the Social Security Act lists exceptions to that filing requirement. 42 U.S.C. § 405(c)(5). None of those exceptions, however, apply to self-employed claimants whose disabilities, or other circumstances beyond their control, prevented them from filing their returns within the statutory limitations period.

B. Factual Background

Mr. Acierno worked as a janitor in 1992 and 1993, the years in dispute here. The lower courts and the Commissioner treated Mr. Acierno's income earned during those years as self-employment income. (A-7; A-19 – A-20; A-37.)

During the limitations periods for the 1992 and 1993 tax years, Mr. Acierno suffered from severe mental illness, including bipolar disorder, anxiety, and affective disorders. (A-4.) He was hospitalized on and off throughout that period. He suffered from a severe manic episode from January through August 1993, resulting in his involuntary hospitalization for a month. He was also hospitalized in January and October of 1996.

Shortly thereafter, on December 24, 1996, Mr. Acierno followed the advice of his doctors and stopped working. His doctors believe it is unlikely he will ever be able to return to work.

In addition to mental illness, Mr. Acierno suffered from Cerebral Metabolic Disorder ("CMD") caused by chemotherapy treatments for testicular cancer. (A-4.) CMD inhibited Mr. Acierno's brain functioning. Because of his CMD and mental illness, Mr. Acierno could not, and cannot, perform even simple, routine tasks such as driving, paying

bills, attending church, or being in crowds. (A-4.) His condition also rendered Mr. Acierno unable to prepare his tax returns. (A-11.)

Although he was assisted by an accountant, Mr. Acierno was unable to file his 1992 and 1993 returns until December 1997. The limitations periods for those tax years expired on April 15, 1996 and April 15, 1997, respectively. The IRS accepted Mr. Acierno's 1992 and 1993 returns as sufficient evidence of income he earned during those years.

C. Jurisdiction Below and the Decisions Below

Jurisdiction in the district court and the court of appeals was appropriate pursuant to 42 U.S.C. §§ 405(c)(9) and 405(g) because Mr. Acierno's claim concerned a final decision of the Commissioner issued after a hearing to which Mr. Acierno was a party, and Mr. Acierno resided within the Eastern District of New York. Jurisdiction in the administrative tribunal was proper pursuant to 42 U.S.C. § 405(b)(1).

1. The Commissioner and the District Court Deny Mr. Acierno's Claim For Disability Benefits

Mr. Acierno (through his wife) filed an application for disability benefits in April 1998. The SSA Office of Disability and International Operations denied his application eight days later. That denial was upheld at each level of the administrative review process, including a decision issued by an administrative law judge ("ALJ") after a hearing. After the SSA Appeals Council denied Mr. Acierno's request to review the ALJ's decision, that decision became the final decision of the Commissioner.

Having exhausted his administrative remedies, Mr. Acierno appealed to the United States District Court for the Eastern District of New York, which affirmed the

Commissioner's decision. Both the Commissioner and the district court limited their analyses to Mr. Acierno's failure to timely file his tax returns. Neither the Commissioner nor any fact-finder below challenged Mr. Acierno's claim on any other ground.

2. The Court of Appeals Reluctantly Affirms

Mr. Acierno appealed to the United States Court of Appeals for the Second Circuit. In ruling on Mr. Acierno's appeal, the Second Circuit acknowledged that Mr. Acierno worked in 1992 and 1993. (A-5.) It also acknowledged that his mental illness prevented him from timely filing his tax returns for those years:

> a man whose mental illness prevents him from working, and who in fact qualifies for disability coverage, nonetheless receives no disability benefits because he filed his tax returns too late – an error due in large part to his affliction.

(A-11.)

Nevertheless the Second Circuit affirmed the district court's decision, stating that it lacked the power to impose an equitable toll: "the history, text, and structure of § 405(c) compel us to hold that equitable tolling does not apply to that provision. Only Congress can amend the statute to provide otherwise." (A-3.) The court reasoned that the phrase "but only" preceding the list of exceptions set forth in § 405(c)(5) (which does not include any equitable exceptions for self-employed claimants) suggested Congress's intent to make that list exclusive.

The lower court also explained that Congress was concerned that self-employed claimants would file "spurious or merely inaccurate and unverifiable claims [of coverage] based on after-the-fact evidence" and had therefore created a conclusive presumption that, after expiration of the limitations period for a given year, a claimant earned no self-employment income for that year if there was no Earnings Record entry for it. (A-9.) At the same time, the lower court expressed dissatisfaction with its decision, stating: "the result in this case seems harsh to us . . . ." (A-11.)

REASONS FOR GRANTING THE WRIT

This Court should grant the requested writ for three reasons: (1) the decision below conflicts with rulings of this Court, and other federal courts, that consistently interpret the Social Security Act broadly and employ tolling and other equitable exceptions to provide coverage to deserving beneficiaries in cases where the language of a statutory provision may otherwise preclude coverage; (2) the lower court's ruling directly conflicts with that of the only other federal court to decide whether it had the authority to equitably toll the statutory provision in question; and (3) the issue is one of grave importance to those potential social security beneficiaries affected.

I. THE DECISION BELOW CONFLICTS WITH THE REASONING AND SPIRIT OF PRIOR DECISIONS OF THIS COURT AND NUMEROUS FEDERAL COURTS

The decision below is inconsistent with reasoning employed by this Court and numerous other federal courts in cases, like this one, where plainly deserving claimants have been denied benefits based on unfair or overly technical readings of the Social Security Act. Citing Congress's clearly expressed intent that the Act be read broadly to favor claimants, the courts have consistently overturned such

unfairly restrictive decisions by asserting their equitable power to toll, or otherwise create exceptions to, Social Security Act provisions. *See, e.g., Bowen v. City of New York*, 476 U.S. 467 (1986) (unanimous court); *Damon v. Sec'y of Health, Educ. & Welfare*, 557 F.2d 31 (2d Cir. 1977); *Haberman v. Finch*, 418 F.2d 664 (2d Cir. 1969); *Conklin v. Celebrezze*, 319 F.2d 569 (7th Cir. 1963); *McCuin v. Sec'y of Health & Human Servs.*, 817 F.2d 161 (1st Cir. 1987).

A. This Court's Decision In *Bowen v. City of New York*

In *Bowen,* this Court explained that courts may equitably toll a statute of limitations so long as tolling is consistent with congressional intent in enacting the relevant statutory scheme. 476 U.S. at 479; *see Hollman v. Dep't of Health & Human Servs.*, 696 F.2d 13, 16 (2d Cir. 1982) (characterizing § 405(c)(4) as a statute of limitations). The Court, reasoning that Congress designed the Social Security Act to be "unusually protective of claimants", equitably tolled § 405(g) of the Social Security Act for mentally disabled claimants faced with a covert agency policy regarding eligibility criteria. 476 U.S. at 480 (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)).

This Court further explained that tolling § 405(g) was "consistent with the overall congressional purpose and is nowhere eschewed by Congress." *Id.* at 480 (internal quotation omitted); *see also United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 543-44 (1940) (explaining that legislative purpose is more important to a statute's interpretation than the plain meaning of its language); *see also Public Citizen v. Dep't of Justice*, 491 U.S. 440, 454-55 (1989) (discussing the importance of interpreting a statute in accordance with congressional intent); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892) ("If a

literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."); *United States v. Kirby*, 74 U.S. 482, 486 (1868) ("General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.").

Although the provision at issue here, § 405(c)(4), is not the same provision examined in *Bowen*, the court below could and should have applied the same reasoning. Both provisions are located in the same statute – a statute Congress designed to be protective of claimants. And nothing in the language of § 405(c)(4) or in its legislative history states that Congress intended to preclude equitably tolling that provision.

The Second Circuit wrongly read the legislative history as indicating that Congress did not want equitable tolling to apply to § 405(c)(4). There is evidence Congress was concerned that self-employed claimants would submit faulty tax returns after expiration of the limitations period. But there is no evidence that Congress had the same concern about claimants, like Mr. Acierno, who were *unable* to timely file by virtue of the very disabilities that made them eligible for benefits in the first place.

B. Other Federal Court Decisions

The lower court's decision also conflicts with other federal courts that have read exceptions into the Social Security Act to uphold the Act's overall, remedial purpose.

In *Damon*, the Second Circuit itself interpreted the Act broadly to award benefits to an adopted child. 557 F.2d at 34-35. And in *Haberman*, that same court created an exception to award student benefits to a claimant who would not otherwise qualify, reasoning that (i) the claimant belonged to the class of people Congress intended to benefit from the Social Security Act provision at issue, and (ii)

courts must apply the Act broadly to aid intended beneficiaries. 418 F.2d at 667.

The Seventh Circuit, in *Conklin*, applied the Social Security Act broadly to "accomplish its moral purpose" and awarded the claimant old age insurance benefits, even though she was ineligible for such benefits under a technical reading of the statute. 319 F.2d at 571 (internal quotation omitted). The court reasoned that it was unlikely Congress intended such a result. *Id.*

In *McCuin*, the First Circuit relied in part on the remedial nature of the Social Security Act to find in favor of a Medicare claimant when the regulations underlying the claim were promulgated under the Social Security Act. 817 F.2d at 174. That court explained that holding otherwise would frustrate Congress's intent to interpret regulations promulgated under that Act consistently with the Act's "beneficent purposes." *Id.*

Similarly, the Fifth and Second Circuits have relied on the Social Security Act's remedial, beneficent purpose to allow claimants to introduce new evidence at the appellate level for consideration on remand. *Williams v. Califano*, 590 F.2d 1332, 1334 (5th Cir. 1979); *Cutler v. Weinberger*, 516 F.2d 1282, 1285-87 (2d Cir. 1975).

Like the courts of appeal, district courts have read exceptions into the Social Security Act when necessary to achieve the Act's beneficent purpose. *See, e.g., Schmiedigen v. Celebrezze*, 245 F. Supp. 825 (D. D.C. 1965). In *Schmiedigen*, the United States District Court for the District of Columbia relied on the Social Security Act's benevolent purpose to award old age survivor's insurance benefits to a mentally incompetent woman, to whom the Commissioner had denied benefits in effect because of her mental incompetence. *Id.* at 827.

Although the claimant was technically ineligible for benefits because she resided in a mental institution rather than with her husband when he died, the court held that an exception was necessary to construe the Social Security Act reasonably and achieve its broad, remedial purpose. The court reasoned: "by necessary and inescapable implication, an exception should be read into the law for individuals who through mental illness are bereft of responsibility for their actions." *Id.*

II. THE HOLDING OF THE DECISION BELOW IS IN DIRECT CONFLICT WITH THAT OF ANOTHER FEDERAL COURT

The court of appeals' decision also conflicts with the only other decision to rule specifically on whether a federal court has the power to equitably toll the limitations period in § 405(c)(4). *See Smith v. Shalala*, 910 F. Supp. 152 (D. N.J. 1995). In *Smith*, the claimant's abusive husband had forced her to sign their joint tax returns – which failed to report her self-employment income – without allowing her to review or edit them. *Id.* at 155. Later, the Social Security Administration denied her claim for disability benefits solely because she had failed to timely file returns showing her self-employment income. *Id.* at 158.

The district court overturned the Commissioner's ruling and remanded the case to the Commissioner with instructions to (i) consider the facts that prevented Smith from having the control needed to timely file her returns; and (ii) determine the length of the tolling period. *Id.* at 160. If, after that determination, Smith's amended returns were timely filed, then the Commissioner was required to amend Smith's Earnings Record to include her self-employment earnings from those years. *Id.*

The court reasoned that, where circumstances prevented a claimant from having the control needed to file

APPENDIX

her tax returns within the § 405(c)(4) limitations period, tolling "best effects the purposes of the [Social Security] Act." *Id.* at 159. It determined that Congress only intended to preclude the amendment of self-employed claimants' Earnings Records outside the limitations period for claimants who controlled the reporting of their income during that period. *Id.* at 159-60.

III. THIS CASE PRESENTS AN IMPORTANT PUBLIC POLICY ISSUE

Exercise of this Court's equitable powers to toll the limitations period here is necessary to prevent an absurd outcome, and one that Congress surely never intended – the denial of disability benefits to individuals because they are too disabled to timely complete the necessary paperwork. For those affected, this is a matter of grave importance and manifest unfairness.

Mr. Acierno urges this Court to grant certiorari and correct the injustice done to him and to others similarly situated.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully submitted,

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April 20, 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: January 16, 2007 Decided: January 24, 2007)

Docket No. 03-6217-cv

VINCENT JAMES ACIERNO,

Plaintiff-Appellant,

—v.—

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,

Defendant-Appellee.

Before:

STRAUB and WESLEY, *Circuit Judges*, and UNDERHILL, *District Judge.*[*]

Appeal from a final judgment of the United States District Court for the Eastern District of New York (Allyne R. Ross, *Judge)*, holding that equitable tolling does not apply to the limitations period for amending records that determine a self-employed individual's eligibility for Social Security disability coverage, set forth at 42 U.S.C. § 405(c)(1)(B), (c)(4). We agree that equitable tolling is inconsistent with Congress's intent in enacting § 405(c)(1)(B), (c)(4).

AFFIRMED.

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[*] Stefan R. Underhill of the United States District Court for the District of Connecticut, sitting by designation.

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STRAUB, *Circuit Judge:*

Plaintiff-Appellant Vincent James Acierno appeals from an August 18, 2003 judgment of the United States District Court for the Eastern District of New York (Allyne R. Ross, *Judge)* granting judgment on the pleadings and administrative record in favor of Defendant-Appellee Jo Anne B. Barnhart, the Commissioner of Social Security. The Commissioner originally denied Acierno's claim for social security disability benefits on the ground that he was not "insured" under the Social Security Act, 42 U.S.C. §§ 301-1397jj, as amended. *See* 42 U.S.C. § 423(c)(1) (requiring and defining insured status). On judicial review of the Commissioner's denial, Acierno claimed that he lacked insured status only because his mental illness prevented him from filing his tax returns within the time period set forth at 42 U.S.C. § 405(c)(1)(B), (c)(4), and that the Commissioner committed an error of law by failing to toll the limitations period due to his affliction. In an unreported decision, the District Court concluded that the doctrine of equitable tolling was inconsistent with the congressional intent animating § 405(c)(1)(B), (c)(4) and therefore dismissed Acierno's complaint.

The precise issue on appeal is whether the limitations period set forth at § 405(c)(1)(B), (c)(4) may be equitably tolled. While Acierno's personal circumstances are sympathetic and the result we reach today is harsh, the history, text, and structure of § 405(c) compel us to hold that equitable tolling does not apply to that provision. Only Congress can amend the statute to provide otherwise.

BACKGROUND

I. *Social Security Eligibility*

An individual's eligibility for social security disability benefits depends on how much he has worked and earned in the 10 years prior to applying for benefits. Those whose work and income history qualify them for coverage achieve "insured" status under the Social Security Act. 42 U.S.C. § 423(a)(1)(A), (c)(1). As is relevant here, to achieve such status, one must accumulate 20 or more calendar "quarters of coverage" within the 40 calendar quarters prior to filing for benefits. 42 U.S.C. § 423(c)(1)(B)(i). This is known as the "20/40 Rule." A "quarter of coverage" is a period of three months during which one earns a certain amount of money in either wages or self-employment income.[1] 42 U.S.C. § 413(a).

In order to keep track of who qualifies for coverage, the Commissioner of Social Security must maintain records of the wages and self-employment income earned by each individual assigned a social security number. 42 U.S.C. § 405(c)(2)(A). In the case of wage earners, the Commissioner typically obtains this information from W-2 forms filed by the employer. *See Yoder v. Harris*, 650 F.2d 1170, 1174 n.4 (10th Cir. 1981). Regarding the self-employed, the Commissioner gleans this information from tax returns. *Id.* at 1173.

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[1] Each year the Commissioner sets the required amount by or on November 1. 42 U.S.C. § 413(d)(2).

The absence of any entry in the Commissioner's records is evidence that an individual earned no income for the period in question, and therefore did not earn any quarters of coverage. 42 U.S.C. § 405(c)(3).

If the Commissioner's records are incorrect, a person has a limited time within which to correct them. Generally, a person must act to correct errors within three years, three months, and 15 days following the end of the calendar year to which the errors relate. 42 U.S.C. § 405(c)(1)(B), (c)(4). After that limitations period, if the Commissioner's records show no entry for wages paid, those records are presumptive evidence that the person received no wages during the year in question. 42 U.S.C. § 405(c)(4)(B). Importantly, if after the end of the limitations period the Commissioner's records show no entry for self-employment income, those records are *conclusive* evidence that the person received no such income during the year in question, *unless* the person can show that he filed a tax return for the relevant year within the limitations period, or one of a handful of narrow exceptions applies. 42 U.S.C. § 405(c)(4)(C), (c)(5). If the person has filed a tax return within the limitations period, then the Commissioner shall correct her records accordingly. 42 U.S.C. § 405(c)(4)(C).

II. *Acierno's Illness and Failure to File Tax Returns*

In 1990, Acierno was diagnosed with testicular cancer, for which he received chemotherapy. According to his doctors, as a side effect of his chemotherapy he developed "significant psychiatric problems, including depression, anxiety, and manic behavior" that made it difficult for him to "attend to his own personal affairs" and robbed him of the ability to "understand and/or perform the obligations of everyday life."

Although Acierno managed to work for some portions of 1992 and 1993, the record offers conflicting evidence as to whether he was a wage earner or self-employed. His tax returns for those years reflect his income as "self-employment fees." Further, in communications with the Social Security Administration, he repeatedly set forth that he was self-employed at that time. However, at his hearing before an administrative law judge, he testified that he was a wage earner during 1992 and 1993.

In either event, Acierno did not file his 1992 and 1993 tax returns until December 1997, after the limitations period expired as to both years. As a result, the Commissioner recorded no income for Acierno during those years and awarded him no quarters of coverage. Acierno claims that he failed to timely file his tax returns because of the mental illness from which he was suffering, which became so acute in 1993 that he was hospitalized for manic and paranoid behavior. He also claims that he did not timely file because his accountant, without considering the consequences for his social security eligibility, advised his wife that Acierno did not need to consider any "statute of limitations" for filing tax returns since he would not be requesting a refund and since, as a practical matter, it would take a long time to reconstruct the necessary information with little or no input from Acierno, who was too ill to assist.

By the close of 1996, Acierno's physical and mental condition had deteriorated to the point where he could no longer work, and shortly thereafter he filed for social security disability benefits. After a hearing, an administrative law judge denied his application on the ground that he was not insured under the Social Security Act because he did not satisfy the 20/40 Rule. The administrative law judge determined that Acierno was self-employed in 1992 and 1993; he failed to file his 1992 and 1993 tax returns within the limitations period, which created a conclusive, statutory

presumption that he did not earn any self-employment income during those years; as a result, he failed to accrue any quarters of coverage for those years; and due to that failure, he had not accrued the required 20 quarters of coverage within the last 40 calendar quarters. Acierno subsequently sought review by the Social Security Administration Appeals Council, which denied his request.

III. *The District Court Decision*

Proceeding *pro se*, Acierno sought review of the agency's denial in the District Court for the Eastern District of New York. In September of 2002, the Commissioner moved for judgment on the pleadings and the administrative record, pursuant to 42 U.S.C. § 405(g). Despite multiple extensions and at least one warning that the District Court would decide the pending motion if Acierno failed to submit opposition papers, Acierno failed to file responsive papers. In August of 2003, the District Court decided the motion unopposed.

The District Court first considered whether the administrative law judge erroneously found that Acierno was self-employed during 1992 and 1993. Although there was some evidence to the contrary, the District Court concluded that substantial evidence supported the administrative law judge's factual finding.

The District Court next considered whether the administrative law judge committed an error of law by refusing to equitably toll the time limitation set forth at 42 U.S.C. § 405(c)(1)(B), (c)(4). For reasons apparent from the text, structure, and history of the statutory scheme, the District Court concluded that applying equitable tolling to § 405(c)(1)(B), (c)(4) would frustrate the congressional intent behind those provisions. Accordingly, the District Court granted the Commissioner's motion and entered judgment in her favor.

Acierno timely appealed, and we appointed present counsel to represent him. Before us, Acierno urges that he was a wage earner in 1992 and 1993, and that even if the administrative law judge's finding of self-employment stands, equitable tolling applies to § 405(c)(1)(B), (c)(4).

DISCUSSION

"When deciding an appeal from a denial of disability benefits, we focus on the administrative ruling rather than the district court's opinion." *Curry v. Apfel*, 209 F.3d 117, 122 (2d Cir. 2000). "We review the administrative record *de novo* to determine whether there is substantial evidence supporting the Commissioner's decision and whether the Commissioner applied the correct legal standard." *Pollard v. Halter*, 377 F.3d 183, 188 (2d Cir. 2004) (internal quotation marks omitted); *see also 42* U.S.C. § 405(g).

Before turning to the main issue presented here, we easily conclude that substantial evidence supports the Commissioner's determination that Acierno was self-employed in 1992 and 1993. Acierno's belated tax returns for those years clearly categorize his income as "self-employment fees," and on at least two occasions Acierno set forth in his correspondence with the Social Security Administration that he was self-employed in 1992 and 1993. These facts provide ample support for the Commissioner's finding that Acierno's 1992 and 1993 income stems from his self employment, notwithstanding Acierno's contrary hearing testimony. *See Pollard*, 377 F.3d at 188 (defining substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).

We thus confront the following state of affairs: although Acierno claimed self-employment income in 1992 and 1993 sufficient to qualify him as "insured," the Commissioner's records do not reflect that income because Acierno failed to

file his tax returns within the three-year, three-month and 15-day limitations period set forth at § 405(c)(1)(B), (c)(4). Accordingly, there exists a conclusive presumption that Acierno earned no income — and no quarters of coverage — in 1992 and 1993, unless § 405(c)'s limitations period can be equitably tolled.

In order to read an implied equitable tolling provision into a statute that contains no such express provision, "[w]e must determine . . . whether equitable tolling is consistent with Congress' intent in enacting" the statutory scheme. *Bowen v. City of New York*, 476 U.S. 467, 480 (1986). While we have described the Social Security Act as "a remedial statute, to be broadly construed and liberally applied," *Haberman v. Finch*, 418 F.2d 664, 667 (2d Cir. 1969), other more specific considerations lead us to conclude that § 405(c)(1)(B), (c)(4) may not be equitably tolled.

Most important is the history of the provisions that regulate the manner in which self-employed individuals report their work and income figures to the Social Security Administration. Before 1950, self-employed people were not eligible for social security because Congress could not agree on a reliable means of accurately determining their earnings and, in turn, whether they were insured within the meaning of the statute. *Yoder*, 650 F.2d at 1173. This was because, unlike wage earners, a claim of earnings by a self-employed person was not independently verifiable through the W-2 form submitted by an outside employer. *Hollman v. Dep't of Health and Human Servs.*, 696 F.2d 13, 17 (2d Cir. 1982); *see also Yoder*, 650 F.2d at 1174 n.4.

Congress eventually decided to extend social security benefits to the self-employed on the understanding that self-employed people would report their work and earnings history on a separate schedule as part of their income tax return. *Yoder*, 650 F.2d at 1173. But in order to "protect[ ]

the government from spurious or merely inaccurate and unverifiable claims [of coverage] based on after-the-fact evidence," Congress substantially limited the manner in which self-employed individuals could correct the information that they provided to the government. *Hollman*, 696 F.2d at 17 (recognizing that "Congress saw fit to impose a stricter standard for amendment of [the] records" of the self-employed, and "acknowledg[ing] the validity of the policy considerations inherent" in § 405(c)(4)(C)). This history illustrates that Congress, confronted with the specific problem of ensuring that records of the self-employed were reasonably accurate, sought to limit the extent to which those records could be altered and likely would not have intended for equitable tolling to apply.

Moreover, in several ways, the text and structure of § 405 reflect Congress's desire to limit the time and manner in which a self-employed person may amend the Commissioner's records. First, once the period for amending the Commissioner's records has passed, the absence of any entry in those records for a wage earner is only "presumptive" evidence that he earned no wages. By contrast, the absence of an entry for a self-employed person is "conclusive" evidence that he earned no income. 42 U.S.C. § 405(c)(4)(B)-(C). Second, Congress provided 10 exceptions to the limitations period and indicated that these exceptions are exclusive by setting forth that they consist "only" of the specifically enumerated circumstances. None of those circumstances requires a balancing of the equities; instead, they are essentially technical in nature. *See* 42 U.S.C. § 405(c)(5). Third, Congress provided for one exception that might apply here — allowing the Commissioner to amend his records to conform to a later-filed tax return — but specifically disallowed this possibility for the self-employed unless the tax return was filed at some point within the limitations period. 42 U.S.C. § 405(c)(5)(F). Given that the statute provides an exclusive list of exceptions and reiterates, in various

and specific forms, the limits imposed on amending records of the self-employed, we believe it is inconsistent with an open-ended implied tolling provision. *See United States v. Brockamp*, 519 U.S. 347, 352 (1997) (holding that statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate" that equitable tolling did not apply).

Moving beyond the history and language of the statute, we find further support for our conclusion in the fact that ascertaining whether an individual is "insured" within the meaning of the Social Security Act is a determination not "characterized by case-specific exceptions reflecting individualized equities." *Brockamp*, 519 U.S. at 352. Instead, the administrative law judge's role in this regard is rather mechanical, involving primarily the counting of quarters of coverage, which are determined by reference to how much an individual earned over a three-month period. Were we to introduce into this function the need to consider an array of equitable factors, we would effectively create a new and burdensome level of administrative judgment that conflicts with the agency's technical role in determining insured status. Taken together, the above considerations lead us to conclude that implying an equitable tolling provision into § 405(c)(1)(B), (c)(4) would conflict with Congress's intent in enacting that provision.[2]

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[2] We have discovered one district court case holding that equitable tolling applies to § 405(c). *See Smith v. Shalala*, 910 F. Supp. 152 (D.N.J. 1995). We respectfully disagree with *Smith's* reasoning and conclusion, largely because the case fails to focus on § 405(c)'s history, text, and structure in determining whether equitable tolling comports with Congress's intent in enacting that provision.

Acierno contends that because we previously found an implied equitable tolling provision within 42 U.S.C. § 405(g) and applied it in circumstances involving mental illness, *see Canales v. Sullivan*, 936 F.2d 755, 759 (2d Cir. 1991), the same result should follow here. We disagree. Section 405(g) is significantly different from § 405(c)(1)(B), (c)(4). Section 405(g) allows an individual to seek judicial review of the Commissioner's decision within 60 days of the date that notice of the decision is mailed to him. Section 405(g), unlike § 405(c)(1)(B), (c)(4), specifically allows the Commissioner to toll the 60-day limitations period and to do so indefinitely, which indicates Congress's "clear intention to allow tolling in some cases." *Bowen*, 476 U.S. at 480. Moreover, unlike § 405(c)(1)(B), (c)(4), the history of § 405(g) does not indicate that Congress, acting in response to a specific concern, intended to severely limit the time in which a claimant could seek judicial review. Finally, § 405(g) does not contain the exclusive language set forth in § 405(c)(5). 42 U.S.C. § 405(c)(5) (setting forth that exceptions to limitations period exist, "but only" under certain circumstances). Accordingly, our conclusion as to § 405(g) does not control here.

As we have noted, the result in this case seems harsh to us: a man whose mental illness prevents him from working, and who in fact qualifies for disability coverage, nonetheless receives no disability benefits because he filed his tax returns too late — an error due in large part to his affliction. However, today's outcome is driven by factors that bind us, namely, the history, text, and structure of § 405(c). The decision whether to amend the statute to allow equitable tolling in appropriate cases, such as this one, rests exclusively with Congress.

CONCLUSION

For the reasons set forth above, we hold that equitable tolling does not apply to the limitations period contained in 42 U.S.C. § 405(c)(1)(B), (c)(4), and we AFFIRM the judgment of the District Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

VINCENT JAMES ACIERNO, Plaintiff, -against- JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, Defendant.	:	FILED IN CLERK'S OFFICE U.S. DISTRICT COURT E.D. N.Y. AUG 08 2003 02-CV-1374 (ARR) OPINION AND ORDER

ROSS, United States District Judge:

Plaintiff Vincent J. Acierno applied to the Social Security Administration ("SSA") for disability insurance benefits on April 10, 1998. His claim was denied initially and upon reconsideration. A hearing was held before an Administrative Law Judge ("ALJ"), and afterwards, on June 21, 1999, the ALJ determined that plaintiff was not insured under the Social Security Act ("the Act"). After the SSA Appeals Council denied plaintiff's request for review, the ALJ's findings became the final decision of the Commissioner of Social Security ("Commissioner"). Plaintiff then commenced this action.

By motion dated September 23, 2002, the Commissioner moves for judgment on the pleadings. In spite of a warning that the case would be decided unopposed, plaintiff has not filed any submissions in support of his claim. For the reasons given below, the court grants the Commissioner's motion.

BACKGROUND

At the time of the ALJ's determination, plaintiff was 34 years old and resided in Staten Island, New York, with his wife and four children. Tr. 33-34. In his application for disability insurance benefits, he stated that he became unable to work on December 24, 1996, as a result of bipolar disorder, manic depression, substance abuse and other afflictions. Tr. 65. Plaintiff consistently referred to December 24, 1996, as his disability onset date, but he gave inconsistent job histories in various statements to the Commissioner. In his application for benefits, he claimed that he worked for Metropolitan Life Insurance Company from 1995 until December 24, 1996, and that he did not work between 1990 and 1993 or 1994. Tr. 66. However, in his disability report, plaintiff stated that he owned a landscaping business between 1984 and 1991, and that he did cleaning work as a janitor between 1991 and 1995. Tr. 101. At his hearing, plaintiff testified that he didn't know whether he had performed landscaping work from 1984 to 1991, as indicated in his disability report. Tr. 37. He also said that, contrary to the statement on his application for benefits, he worked in 1992 and 1993 as a janitor. Tr. 39, 42. Plaintiff suggested that the inconsistencies were attributable to the fact that he "didn't fill out that application . . . [but] just signed it." *Id.* In a disability report, a Social Security field officer confirmed his story, noting that plaintiff's wife filed his claim while plaintiff stayed in the car outside, too "paranoid" to come into the office and "almost" unwilling to sign the applications. Tr. 96.

Plaintiff filed tax returns for years 1992 and 1993 on December 4, 1997, and December 9, 1997, respectively. Tr. 68-77. He explained to the SSA that he had failed to file the tax returns in a timely fashion because his psychological illness prevented him from doing so. Tr. 43. On July 8, 1999, the IRS accepted the late returns and agreed to plaintiff's

offer-in-compromise, which set forth a 12-month schedule in which plaintiff would pay $2,800 for taxes owed from 1992 through 1997. Tr. 154.

As discussed below, a claimant qualifies for disability benefits only if he worked for a certain amount of time prior to the onset of his disability. The Commissioner has a work history for each claimant, derived from W-2 forms submitted by employers and from tax returns the claimant files with the IRS. Within a certain limitations period, a claimant can amend his work history as contained in the Commissioner's records by filing a late tax return. Plaintiff recognized that if the Commissioner's records were not amended to include his alleged self-employment earnings from 1992 and 1993, the Commissioner's records would not reflect sufficient employment for him to qualify for benefits. Plaintiff conceded that his late returns were filed after the limitations period expired. Nevertheless, he argued that because he lacked the mental capacity to file within the time limitation, fairness dictated that his 1992 and 1993 earnings should be included in the Commissioner's records. To deny him credit for work performed in those years, plaintiff contended, would penalize him for the very disability that required him to seek benefits. At his hearing, his counsel suggested that such a denial "seems to be in contradiction to what Social Security is all about." Tr. 45.

Letters written by two of plaintiff's treating physicians support his contention that mental problems prevented him from filing his 1992 and 1993 tax returns within the limitations period. Dr. David Wolf claimed that his treatment of the plaintiff for testicular cancer, starting in 1990, produced "significant psychiatric problems including depression, anxiety and manic behavior," and that "[a]t times, he finds it difficult to attend to his own personal affairs owing to psychiatric difficulties." Tr. 141. Dr. Larry Kirstein, who started treating the plaintiff in 1984, stated that, "[a]s a result of his

preoccupation with his fears and paranoia, he was unable to consistently manage his affairs." Tr. 152. Kirstein added that after a "profound psychotic/manic episode" in August of 1993, plaintiff "remained unable to manage his affairs." *Id.*

Mentioning but not discussing plaintiff's mental incapacity argument, the ALJ determined that plaintiff's 1992 and 1993 income could not be included in the Commissioner's record because tax returns for those years were filed after the § 405(c)(1)(B) time limitation had elapsed. Tr. 25. He noted that, according to the Commissioner's records, plaintiff last qualified for disability benefits in 1986. *Id.* Therefore, the ALJ reasoned, plaintiff was not insured within the meaning of the Act due to his insufficient work history. *Id.*

In support of his application to the SSA Appeals Council, plaintiff filed a letter from Dr. Joel Hoffman, another treating psychiatrist. Dr. Hoffman opined that plaintiff's Cerebral Metabolic Disorder, which was likely triggered by chemotherapy he received in the early 1990s, prevents him from performing tasks such as "the complex filing of legally required income tax returns." Tr. 10. The Appeals Council found no basis for overturning the ALJ's decision. Tr. 5. This appeal followed.

DISCUSSION

Plaintiff has not submitted any memoranda in support of his claim, so his precise arguments are not known. The court assumes that he advances the same argument he made before the ALJ, that the limitations period within which a claimant must amend the Commissioner's employment records should be tolled, and that the ALJ should amend the Commissioner's records in his case to reflect his self-employment income from 1992 and 1993.

Standard of Review

This case comes to the court for review of the Commissioner's decision that the plaintiff did not acquire insured status under the Social Security Act. The court's role in reviewing the decisions of the Social Security Administration "is not whether the evidence preponderates in the Secretary's favor." *Dumas v. Schweiker*, 712 F.2d 1545, 1553 (2d Cir. 1983). Rather, its task is narrowly confined to assessing whether the Commissioner applied the correct legal standards in making his determination and whether that determination is supported by substantial evidence. *See* 42 U.S.C. §§ 405(g), 1383(c); *Johnson v. Bowen*, 817 F.2d 983, 985 (2d Cir. 1987); *Donato v. Secretary*, 721 F.2d 414, 418 (2d Cir. 1983).

Legal Background

A claimant has worked enough to qualify for benefits — i.e. to be "insured" within the meaning of the Act — if he has at least 20 quarters of coverage ("QC"'s) in the 40 quarter period preceding the onset of his disability. 42 U.S.C. § 423(c)(1)(B)(i). A QC is defined as a period of three calendar months ending on March 31, June 30, September 30, or December 31, during which time the claimant earned $50 or more in wages or $100 or more in self-employment income. 42 U.S.C. § 413(a). The Commissioner keeps an earnings record for each individual from which the number of QC's is determined. *See* 42 U.S.C. § 423(c)(2)(A).

Within three years, three months and fifteen days following the end of a year,[1] 42 U.S.C. § 405(c)(1)(B), a claimant may correct an entry for that year in the Commissioner's records. 42 U.S.C. § 405(c)(4). If, for instance, "any item of

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[1] "The term 'year' means a calendar year when used with respect to wages and a taxable year when used with respect to self-employment income." 42 U.S.C. § 405(c)(1)(A).

wages or self-employment income for such year has been omitted from such records," a claimant can submit a tax return showing income for that year, which will be incorporated into the earnings record. 42 U.S.C. § 405(c)(4)(C). An individual can thereby amend the Commissioner's records and establish the requisite QCs to qualify as an insured under the Act.

With regard to wages, once the limitations period expires, the absence of an entry in the earnings record as to wages for a particular time period is "*presumptive* evidence . . . that no such alleged wages were paid to such individuals in such period" which the claimant must rebut. 42 U.S.C. § 405(c)(4)(B) (emphasis added); *see also Butts v. Sec'y of Health and Human Svcs.*, 706 F.2d 107, 108 (2d Cir. 1983) (requiring a claimant confronted with blank wage records to prove his case by the preponderance of the evidence). With regard to self-employment income, however, the absence of an entry in the earnings record is

> conclusive . . . that no such alleged self-employment income was derived by an individual in such year unless it is shown that he filed a tax return of his self-employment income for such year *before the expiration of the time limitation following such year.*

42 U.S.C. § 405(c)(4)(C) (emphasis added). The different treatment between wages and self-employment income reflects the different control wage earners and the self-employed have over their employment records. Whereas a wage earner should not be penalized if his employer negligently failed to file a W-2 on his behalf, someone who is self-employed can look out for his own interests. Indeed, a self-employed individual has an ability to file fraudulent records in the hopes of qualifying for benefits. *See generally*

Hollman v. Dep't. of Health and Human Servs., 696 F.2d 13, 17 (2d Cir. 1982), *Shore v. Califano*, 589 F.2d 1232, 1237 (3d Cir. 1978).

The Nature of Plaintiff's Alleged Employment in 1992 and 1993

Because absence of wages in an individual's earnings record may be rebutted after the expiration of the limitation period, while absence of self-employment income generally may not, the determination of whether an individual's earnings are wages or self-employment income is important. If, for instance, plaintiff's earnings from 1992 and 1993 were wages rather than self-employment earnings, plaintiff could come forward with convincing evidence indicating that he had received wages during those years to rebut the presumptive effect of the Commissioner's records. If, however, his income from those years was from self-employment, the claimant would have to show that his case falls within one of a limited number of exceptions to the limitation period.

Plaintiff initially argued that his earnings from 1992 and 1993 were wages. A memorandum of law filed on his behalf before the ALJ stated that he had worked for an employer who had never given him a W-2 form and who had failed to report his earnings in a timely fashion during those years. Tr. 144. However, in a letter to the Appeals Council dated October 4, 1999, plaintiff stated that "during the years 1992 and 1993, the claimant was self-employed," and that he "was both employer and employee." Tr. 17. Also, in his request for a hearing before the ALJ, plaintiff wrote, "I feel my self-employment earnings for 1992 and 1993 should be credited to the earnings record." Tr. 50. Finally, plaintiff's tax returns for those years describe the 1992 and 1993 income as "self-employment fees." Tr. 68, 73. In light of this evidence, the

court finds that the ALJ correctly determined that the money plaintiff earned in 1992 and 1993 was self-employment income. Tr. 17.

Equitable Tolling

Plaintiff argues that his tardiness in filing the tax returns for 1992 and 1993 resulted from his mental illness and should be excused, thereby permitting him to correct the Commissioner's records. By so arguing, plaintiff effectively asks the court to apply the doctrine of equitable tolling to extend the limitations period contained in Section 405(c)(4). Equitable tolling allows courts to "extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances." *E.g.*, *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996) (citing *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 264 (2d Cir. 1990)). In general, a limitations period that is analogous to a statute of limitations may be equitably tolled, whereas a limitations period which stands as a jurisdictional prerequisite may not. *See Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95 (1990). The Second Circuit has previously characterized the limitations period at issue here as a statute of limitations. *Hollman*, 696 F.2d at 17.

The Supreme Court has cautioned that equitable tolling should be applied "only sparingly." *Irwin*, 498 U.S. at 96. Courts have permitted litigants to invoke the doctrine in the following situations: (1) where the plaintiff was misled by his adversary's misconduct into allowing the deadline to pass; (2) where the plaintiff has asserted his claim timely but in the wrong forum; and (3) where extraordinary circumstances beyond the plaintiff's control prevented him from exercising his rights. *Oshivier v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994); *see also John v. Kings County Hospital Ctr.*, No. 98 Civ. 7846, 2000 U.S. Dist. LEXIS 5179, at *9 (E.D.N.Y. Mar. 27, 2000). The Second

Circuit has held that litigants beset by mental illness and therefore incapable of heeding limitations periods can fall into the third category. *Canales v. Sullivan*, 936 F.2d 755, 758 (2d Cir. 1991); *see also Nunnally v. MacCausland*, 996 F.2d 1, 6-7 (1st Cir. 1993). The dispositive issue, then, is whether Section 405(c)(4), the particular limitation period at issue in this case, permits equitable tolling for any reason.

The court has uncovered two instances when courts have considered this precise question. In *Hollman v. Dep't of Health and Human Servs.*, Judge Pollack in the Southern District ruled that a plaintiff's mental incompetency could not excuse his failure to amend the Commissioner's employment records within the three-year, three-month, and fifteen-day period prescribed by Section 405(c)(4). 501 F. Supp. 255, 259 (S.D.N.Y. 1980), *rev'd on other grounds*, 696 F.2d 13 (2d Cir. 1982). Observing that "the right to social security benefits is a right created by Congress," Judge Pollack reasoned that "the time limitation incorporated by Congress must be strictly construed," and that "[t]his court is not empowered to legislate where Congress has failed to do so." 501 F. Supp. at 257, 258. He supported his decision by citing to a Ninth Circuit case, in which the court ruled that Section 405(g) of the Act, which requires that a request for review of an agency determination be filed within sixty days of the agency's final decision, could not be equitably tolled. *See Wimberley v. Finch*, 446 F.2d 888 (9th Cir. 1971). Judge Pollack's decision pre-dates *Canales*, however, in which the Second Circuit ruled that a claimant's mental incapacity can serve as a basis for tolling Section 405(g). *Canales*, 936 F.2d at 756.

In *Smith v. Shalala*, the plaintiff claimed that she could not amend the Commissioner's records of her self-employment income within Section 405(c)(4)'s time limitation due to her abusive husband's interference with her tax returns. 910 F. Supp. 152, 154 (D.N.J. 1995). Stating that "tolling in this

case best effects the purposes of the Act," the district court in New Jersey ruled that a claimant's incapacity could toll Section 405(c)(4)'s limitation period. *Id.* at 159-60. As a case from outside the Second Circuit, however, *Smith* is of limited precedential value. *See Town of Moreau v. New York State Dep't of Environmental Conservation*, No. 96 Civ. 983, 1997 U.S. Dist. LEXIS 6519, at *26 (N.D.N.Y. May 5, 1997) (finding that a District of New Jersey case is of limited precedential value to a court sitting within the Second Circuit).

Without controlling authority on point, the court must consider the issue posed by this case in broader terms to determine whether the doctrine of equitable tolling and Section 405(c)(4) are compatible. Generally speaking, the doctrine of equitable tolling is read into every federal statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). Elaborating upon this general rule, the Second Circuit held that this "policy is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language." *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236, 241 (2d Cir. 1962). Although this statement is several decades old, district courts in this circuit have hewed to its strong endorsement of "implied equitable tolling," i.e., reading equitable tolling into every federal statute. *See, e.g., Miele v. Pension Plan of N.Y. State Teamsters Conf. Pension & Retirement Fund*, 72 F. Supp. 2d 88, 103 (E.D.N.Y. 1999) (Raggi, D.J.); *Pettola v. Nissan Motor Acceptance Corp.*, 44 F. Supp. 2d 442, 448 (D. Conn. 1999); *Moll v. U.S. Life Title Ins. Co.*, 700 F. Supp. 1284, 1287-88 (S.D.N.Y. 1988).

Since 1962, when the Second Circuit announced its view of implied equitable tolling, the Supreme Court has shied away from a rule requiring a clear and unambiguous statement from Congress and instead has emphasized Congressional purpose and intent to determine whether Congress meant a particular statute of limitations to be subject to the doctrine.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court concluded "that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559. In *Bowen v. New York*, 476 U.S. 467 (1986), the Court agreed that equitable tolling could be read into a federal statute of limitations "[w]hen application of the doctrine is consistent with Congress' intent in enacting a particular statutory scheme . . . ." *Id.* at 479. Following this lead, the Ninth Circuit has ruled that "[e]quitable tolling of the statute of limitations is a defense to all federal statutes of limitations, even those expressly contained within a given cause of action, unless tolling would be inconsistent with the legislative purpose." *Ellis v. San Diego*, 176 F.3d 1183, 1189 (9th Cir. 1999). Other circuits similarly emphasize the consistency of equitable tolling with congressional intent in determining whether a particular federal statute of limitations contains an implied tolling provision. *E.g.*, *United States v. Clymore*, 245 F.3d 1195, 1197 (10th Cir. 2001); *Rashidi v. American President Lines*, 96 F.3d 124, 127 (5th Cir. 1996); *Branch v. G. Bernd & Co.*, 955 F.2d 1574, 1580 (11th Cir. 1992).

In light of *Bowen*, *American Pipe*, and the several circuits that have interpreted them, the implied equitable tolling rule announced by the Second Circuit in *Atlantic City* some forty years ago must be modified. *Cf United States Football League v. National Football League*, 887 F.2d 408, 416 (2d Cir. 1989) (upholding a district court's decision not to follow Second Circuit precedent in light of subsequent Supreme Court jurisprudence). Thus, the court decides the issue in this case by the following metric: a federal statute of limitations is construed to include the doctrine of equitable tolling unless Congress expressly provides to the contrary in clear and

unambiguous language, or unless doing so would conflict with Congressional intent or the legislative purpose behind the time period.

Nowhere in Section 405(c)(4) or its sequellae did Congress expressly declare that equitable tolling would not apply. Rather, in Section 405(c)(5), the Act permits the Commissioner to "change or delete any entry with respect to wages or self-employment income" "[a]fter the expiration of the time limitation," "*but only*" if the claimant's case fits one of ten limited exceptions. 42 U.S.C. § 405(c)(5)(A)-(J) (emphasis added).[2] Equitable tolling is not mentioned. The "but only" term suggests that Congress intended the list of exceptions to be exhaustive, although if Congress wished to exclude equitable tolling expressly it could have done so.

Furthermore, by the maxim *expressio unius est exclusio alterius*, there is an inference that a list of exceptions in a statute "should be understood as exclusive." 2A Norman J. Singer, *Statutes and Statutory Construction* §47:23 (6th ed. 2000) [hereinafter "Singer"]; *see also Pauley v. BethEnergy Mines*, 501 U.S. 680, 719 (1991) (Scalia, J., dissenting) ("When a provision sets forth a general rule followed by specific exceptions to that rule, one must assume — absent other evidence -- that no further exceptions are intended."). However, "[v]enerable as it is, *expressio unius* should be applied warily." *INS v. Federal Labor Relations Authority*, 4 F.3d 268, 272 (4th Cir. 1993); *see also Bell v. Bell*, 225 F.3d 203, 226 (2d Cir. 2000); *In re Continental Casualty Co.*, 29 F.3d 292, 294 (7th Cir. 1994). As one court observed, "[t]he problem with *expressio unius* is that it assumes that Congress

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[2] Such exceptions include to correct errors apparent on the face of such records, *id.* § 405(c)(5)(C), and to reduce the time reflected in an entry which is erroneous as a result of fraud. *Id.* § 405 (c)(5)(E). Plaintiff does not argue, and the court does not find, that any of these exceptions apply to his case.

both considered every conceivable situation and intended to address them all by addressing a few." *Federal Labor Relations Authority*, 4 F.3d at 272. Also, "[t]he rule is a rule of statutory construction and not a rule of law. The maxim is subordinate to the primary rule that the legislative intent governs the interpretation of the statute." 2A Singer § 47:23; *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n. 23 (1983) (refusing to rely on *expressio unius* and noting that such canons "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose").

Although Congress could have more clearly expressed its desire to prohibit the application of equitable tolling to Section 405(c)(4), an analysis of its intent and purpose in enacting the limitation period strongly suggests that it in fact did not intend equitable tolling to apply. "Generally, social legislation should be liberally construed in favor of those intended to benefit from it." 3 Singer § 58:4. In finding that Section 405(g) impliedly permitted equitable tolling, the Supreme Court noted that Congress designed the Act "to be 'unusually protective' of claimants." *Bowen*, 476 U.S. at 480, *quoting Heckler v. Day*, 476 U.S. 104, 106 (1984). However, as the Third Circuit stated in a case similar to the instant one, "[a]lthough the purpose of the Act would lead us to construe it in favor of a claimant when that is logically possible, there are other legislative concerns meriting consideration." *Shore*, 589 F.2d at 1236.

Prior to 1950, self-employed individuals were not included in the Social Security system, as there was no agreed-upon method to obtain reports of their income. *Id.* at 1237. According to the then-Commissioner, developments in the tax system for reporting income permitted the extension of coverage to the self-employed. *See Yoder v. Harris*, 650 F.2d 1170, 1173 (10th Cir. 1981) (discussing the testimony of the Commissioner before the House Committee on Ways and

Means in 1949). The Commissioner could compile work records of the self-employed from their self-completed tax returns. *See id.* However, with the reliability of late-filed tax returns subject to no real rebuttal by the Commissioner, the possibility that a claimant could try to defraud the Commissioner with spurious after-the-fact claims of self-employment income increased. *Cf Shore*, 589 F.2d at 1238; *see also Hollman*, 696 F.2d at 17. Thus, upon amending the Act, Congress adopted "stringent provisions on correction of earnings records," reflecting "fears that the [Commissioner] would be confronted with claims based on earnings in periods many years past for which there could be no effective rebuttal." *Weisbraut v. Secretary*, 757 F.2d 83, 85 (3d Cir. 1985). These "stringent provisions" include the time limitation contained in Section 405(c)(4). Not to read Section 405(c)(4) strictly to preclude equitable tolling would be inconsistent with this Congressional purpose.

Also, the structure of the statute itself indicates Congress's intention not to permit equitable tolling, even when a claimant alleges mental incapacity as his reason for failing to comply with the time limitation. In *United States v. Brockamp*, the Supreme Court ruled that courts cannot equitably toll due to mental disability the statutory time period within which a taxpayer must file for a refund. 519 U.S. 347, 348 (1997). The statutory provision in question, Section 6511 of the Internal Revenue Code, was silent with regard to whether equitable tolling applied. *See* 26 U.S.C. § 6511 (1997). The Court reasoned that

> Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended 'equitable' exceptions into the statute that it wrote. There are no

> counter-indications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.

Brockamp, 519 U.S. at 352. Like Section 6511, Section 405(c)(4) is extremely detailed and written in technical language, with the time limitation, like Section 6511, expressed "in unusually emphatic form." *Id.* at 350. Also, as discussed, Section 405(c)(4) also contains explicit, limited exceptions to the particular time limitation enumerated.

Finally, the Court in *Brockamp* noted that the Internal Revenue Service "processes more than 200 million tax returns each year," and that "[t]o read an 'equitable tolling' exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling'. . . ." *Id.* at 352. It is true that the SSA is capable of and indeed performs the sort of case-by-case analyses of claims for benefits that the IRS cannot undertake. It is also true that the SSA can adjudge claims of disability that allegedly affected a claimant years before he filed for benefits, even when the evidence of this past disability consists of a retrospective diagnosis from a current treating physician. *Cf Rivera v. Sullivan*, 923 F.2d 964, 968-69 (2d Cir. 1991). However,

> [t]he mandate to the [Commissioner] in 42 U.S.C. § 405(c)(2) to maintain . . . records of self-employment income was necessary for the determination in an orderly manner of the innumerable requests for insurance benefits. Congress recognized that a beginning and end of time for establishing eligibility was an essential part of that need by prescribing a 'time limitation' within which changes and revisions in the [Commissioner's] records might be made. One need

> only be reasonable to foresee the disaster in [the SSA] if there were not a reasonable time limitation for ending disputes about eligibility benefits.

Shore, 589 F.2d at 1238 n. 18; *see also Hollman*, 501 F. Supp. at 257-58 (noting that strict adherence to the time limitation is "necessary for the determination in an orderly manner of the innumerable requests for insurance benefits"). Interminable disputes between the Commissioner and claimants who, like plaintiff, allege that they were rendered incapable of meeting statutory deadlines at times *before* the onset of their disability, over the correctness of the Commissioner's records could create serious bureaucratic problems. These administrative difficulties, like the difficulties considered by the Court in *Brockamp*, suggest that Congress intended that Section 405(c)(4) be interpreted strictly.[3]

In ruling that the three-year, three-month, and fifteen-day period cannot be tolled on account of a claimant's mental incapacity, the court recognizes that it draws a distinction between Section 405(c)(4) and Section 405(g), which the

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[3] A year after *Brockamp*, Congress added a new subsection to § 6511 — § 6511(h) — which created an exception to the time limitation for "financially disabled" individuals. § 6511(h) mandates tolling of the limitation period where an individual is "unable to manage his or her financial affairs by reason of a medically determinable physical or mental impairment that can be expected to result in death or to last for a continuous period of not less than 12 months." 26 U.S.C. § 6511(h). Congress has thus responded to the Court's concerns in clear and unambiguous language. It would be imprudent, however, to assume that Congress intends that *all* federal statutory time limitations include an implicit equitable tolling provision based on this Congressional response to *Brockamp*. The types of demands placed on the IRS by untimely-filed refund claims differ significantly from those placed on the Commissioner by claimants attempting to correct the Commissioner's records years after they claimed to have performed the work at issue. If Congress wishes equitable tolling to apply to Section 405(c)(4), it will have to indicate so in spite of the statutory scheme it has created and in spite of the concerns animating the scheme's formation in 1950.

Canales court found to permit equitable tolling. This distinction makes sense. Section 405(g) gives the Commissioner discretion to extend the 60-day time limit for appeal, "thus expressing [Congress'] clear intention to allow tolling in some cases." *Bowen*, 476 U.S. at 480. Moreover, courts determine whether litigants have worthy bases for the equitable tolling of filing deadlines in a myriad of cases and are thus well-equipped to do so in the Social Security context. The court also recognizes that its ruling conflicts with the result in *Smith*. In part, the *Smith* court based its determination on the facts of the particular case. *Smith*, 910 F. Supp. at 160. Insofar as the *Smith* court's holding resulted from an analysis of the statute and relevant case law, the court respectfully disagrees with its reasoning.

The purpose, structure, and intent of Congress in enacting the limitations period in Section 405(c)(4) all strongly suggest that the court should interpret it strictly to preclude a construction that provides for equitable tolling. Although "[i]t is unfortunate that plaintiff must go without the insurance benefits," *Shore*, 589 F.2d at 1238 n. 18, the fact that he did not attempt to correct the Commissioner's records in a timely fashion prevents him from further pressing his claim.

CONCLUSION

For the reasons stated above, defendant's motion for judgment on the pleadings is granted. The Clerk of the Court is instructed to enter judgment accordingly.

SO ORDERED.

/s/ Allyne R. Ross
Allyne R. Ross
United States District Judge

Dated: August 7, 2002
Brooklyn, New York

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SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
Vincent J. Aciemo (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner)	062-60-1839 (Social Security Number)

INTRODUCTION

This case is before the Administrative Law Judge on a request for hearing. After due notice, a hearing was held on June 21, 1999 in Staten Island, NY, at which the claimant appeared and testified. The claimant was represented by Phyllis R. Lederman, Esq.

ISSUES

The issue to be determined is whether the claimant has acquired insured status under the Social Security Act which depends upon whether the claimant has sufficient quarters of coverage under the Act.

EVALUATION

On April 10, 1998, the claimant filed an application for a period of disability and disability insurance benefits, alleging disability since December 24, 1996 due to depression, anxiety and panic disorders. Following denial of the claim initially and upon reconsideration, the claimant filed a timely request for hearing.

After carefully considering the entire hearing record, and for the reasons set forth below, it is my conclusion that the claimant is not under a "disability" within the meaning of the Social Security Act. Accordingly, his claim for benefits under Title II of the Act is denied.

According to the requirements of the Social Security Act, in order to establish entitlement to a period of disability and disability insurance benefits under Title II of the Social Security Act, an individual must be under a "disability" at a time when he satisfies the disability insured status requirements of the Act.

APPLICABLE LAW & REGULATION

Section 223(a)(1) of the Social Security Act provides, as pertinent here, for the payment of disability insurance benefits for an individual who is insured for disability insurance benefits (as determined under subsection [c][1]), has not attained retirement age, has filed an application for disability insurance benefits and is under a disability.

Section 223(C)(1) of the Act provides, as pertinent here, that an individual shall be insured for disability insurance benefits in any month he is a fully insured individual and he had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred, or, if such month ends before the quarter in which he attains age 31, not less than one-half (and not less than six) of the quarters during the period ending with the quarter in which such month occurred and beginning after he attained age 21 were quarters of coverage.

Section 213(a)(1) of the Social Security Act provides that the term "quarter," and the term "calendar quarter," mean a period of three calendar months ending March 31, June 30, September 30 or December 31.

Section 213(a)(2) of the Act provides that for years prior to 1978, a quarter of coverage is a quarter in which an individual has been paid $50.00 or more in wages in employment covered by the Social Security Act or for which the individual has been credited with $100.00 or more in self-employment income (provided such self-employment income was $400.00 or more).

Section 213(d) of the Social Security Act provides that the amount of wages and self-employment income an individual must have to be credited with a quarter of coverage is $250.00 for 1978. The amounts for subsequent years, which take into consideration the increases in average wages for all workers, are: 1979 -- $260.00; 1980 -- $290.00; 1981 -- $310.00; 1982 -- $340.00; 1983 -- $370.00; 1984 -- $390.00; 1985 -- $410.00; 1986 -- $440.00; 1987 -- $460.00; 1988 -- $470.00; 1989 -- $500.00; 1990 -- $520.00; 1991 -- $540.00; 1992 -- $570.00; 1993 -- $590.00; 1994 -- $620.00 and 1995 -- $630.00.

To be considered for any year, self-employment income must be $400.00 or more. No more than four quarters of coverage may be credited to any calendar year.

Section 205(c) of the Social Security Act provides that records of the earnings of all who work in employment or self-employment covered under Social Security will be maintained by the Social Security Administration. For Social Security purposes, these records are evidence of an individual's earnings and the periods in which they were received. An earnings record can be corrected at any time up to three years, three month and 15 days after the year in which wages were paid or self-employment income was derived. After the time limit ends, if Social Security Administration records show no entry of wages for an employer for a particular period or no entry of self-employment income for a year, these records are presumptive evidence that no

wages were paid by the employer in that period, and are conclusive evidence that no self-employment income was received in that year.

Section 205(c)(5) states specifically that no amount of self-employment income of an individual for any taxable year, if such return or statement was filed after the expiration of the time limitation following the taxable year, shall be included in Social Security's records.

Under the provisions of Section 209 and 210 of the Social Security Act, payment to an individual may not be considered wages unless paid for work for performed in a bona-fide employer/employee relationship under a valid contract of employment. The designation of payments as wages or even the reporting of these amounts as wages for Social Security purposes does not in and of itself create such a relationship. In all cases, it must be established that an employer/employee relationship existed between the parties involved and that actual payments were made for services rendered. In order to do this, it is necessary to consider the acts of the parties concerned, as well as their statements, in addition to other extraneous factors of an alleged employment situation, in order to distinguish between an employment relationship within the meaning of the Social Security Act, as opposed to a relationship which exists between parties who have close family ties or are close friends.

Section 211(a) of the Social Security Act provides that the term "net earnings from self-employment" means the gross income, as computed under Chapter One of the Internal Revenue code, derived by an individual from any trade or business carried on by such individual, less the deductions allowed under such chapter which are attributable to such trade or business, plus his distributive share (whether or not

distributed) of the ordinary net income or loss, as computed under Section 183 of such code, from any trade or business carried on by a partnership or which he is a member.

In determining the existence of a trade or business, the following facts must be considered:

a) Was the activity initiated and conducted in good faith with the intention of making a profit or producing income?

b) Has the activity been regularly carried on, *i.e.*, was there a continuity of operations, a constant repetition of transactions, or a regularity of activity?

c) Did the individual have a regular occupation or calling? The activity should be one that is being carried on for the purpose of livelihood or profit.

d) Did the individual hold himself out to others as being engaged in the selling of goods and/or services?

At the hearing, the claimant testified he stopped working on December 24, 1996. He was employed as an insurance agent and he testified that he worked from August 1995-December 1996. Furthermore, the claimant testified that he received disability insurance payments from Met Life at the rate of $1800 per month. The claimant observed that the earnings posted to his earnings record in 1997 represented payment from his disability insurance policy. The claimant testified that, previously, he was employed as a landscaper and maintenance worker from 1992-1995. In 1991, the claimant was receiving disability payments.

The income tax returns produced by the claimant included Forms 1040, Schedule A, Schedule B, and Schedule SE for the year 1993, dated December 9, 1997. For the year 1992, Forms 1040, 2210, Schedule A, and Schedule SE, were dated

December 4 1997 (Exhibit 2D). (The tax returns that were produced by the claimant were unsigned copies dated December 1997.)

According to the earnings record, the claimant did not meet the disability insured status test. Specifically, 20 CFR 404.130 (a) addresses the requirements for determining disability insured status. The first rule states that the claimant must meet the 20/40 requirement. The claimant would be insured in a quarter for purposes of establishing a period of disability, if in that quarter, he is fully insured and has at least 20 QC's in the 40 quarter period ending with that quarter. According to the claimant's earnings record, he was last insured for purposes of disability coverage on June 30, 1986.

Since the claimant filed his tax returns for the years 1992 and 1993, in 1997, he exceeded the time limit of 3 years, 3 months and 15 days. Consequently, Social Security cannot correct their records to agree with the tax returns. The claimant does not meet the disability insured status requirements without the inclusion of the 1992 and 1993 amended earnings.

In conclusion, the claimant filed an application for disability insurance benefits under Title II of the Act on April 10, 1998, and alleged the onset of his disability on December 24, 1996. The claimant's earnings record reflects that the claimant was last insured for disability insurance benefits on June 30, 1986 (Exhibit 4D).

The claimant argued that due to a mental impairment he lacked the capacity to timely file tax returns for tax years 1992 and 1993 (unsigned copies of the claimant's purported tax returns are dated December 9, 1997, Exhibit 2D); more than the time limit of 3 years, 3 months and 15 days (20 CFR 404.802). A review of these tax returns reflect total taxes including self-employment tax of $15,172.00 for 1992 and $13,992.00 for 1993; totaling $29,164.00.

At the hearing, the claimant testified that an Offer in Compromise was made by him to the Internal Revenue Service for which acceptance was anticipated, imminently, to satisfy his obligation for the past due taxes and same was submitted subsequent to the close of the hearing (Exhibit 8F). Review of these documents reflect that IRS accepted the claimant's offer of the sum of $2800.00 to be paid in 12 installments beginning after acceptance of the said offer.

The Social Security Act (Finding 205(c)) and the Regulations (20 CFR 404.801) provide for when the Commissioner may change an individual's record of self-employment income alleged to have been derived by him after the expiration of the time limitation. Review of the Act and the Regulations fail to reflect any basis for change to the claimant's earnings record.

In conclusion, it is the decision of the Administrative Law Judge that the claimant is not insured for Title II disability insurance benefits and is not eligible for such benefits.

After carefully considering the entire hearing record, and for the reasons set forth below, it is my conclusion that the claimant is not under a "disability" within the meaning of the Social Security Act. Accordingly, his claim for benefits under Title II of the Act is denied.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant filed an application for Title II disability benefits on April 10, 1998.
2. The claimant alleged his disability onset date is December 24, 1996 (20 CFR 404.1574).
3. The claimant stopped working on December 24, 1996.

4. The claimant's earnings record reflects that the claimant was last insured for disability insurance benefits on June 30, 1986.

5. It is the decision of the Administrative Law Judge that the claimant is not insured for Title II disability insurance benefits and is not eligible for such benefits.

6. The claimant is not under a "disability" within the meaning of the Social Security Act. Accordingly, his claim for benefits under Title II of the Act is denied.

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on April 10, 1998, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/ Peter F. Crispino
Peter F. Crispino
Administrative Law Judge

September 14, 1999
Date

§ 405. Evidence, procedure, and certification for payments

. . .

(c) Wage records

. . .

(5) After the expiration of the time limitation following any year in which wages were paid or alleged to have been paid to, or self-employment income was derived or alleged to have been derived by, an individual, the Commissioner of Social Security may change or delete any entry with respect to wages or self-employment income in the Commissioner's records of such year for such individual or include in the Commissioner's records of such year for such individual any omitted item of wages or self-employment income but only --

(A) if an application for monthly benefits or for a lump-sum death payment was filed within the time limitation following such year; except that no such change, deletion, or inclusion may be made pursuant to this subparagraph after a final decision upon the application for monthly benefits or lump-sum death payment;

(B) if within the time limitation following such year an individual or his survivor makes a request for a change or deletion, or for an inclusion of an omitted item, and alleges in writing that the Commissioner's records of the wages paid to, or the self-employment income derived by, such individual in such year are in one or more respects erroneous; except that no such change, deletion, or inclusion may be made pursuant to this subparagraph after a final decision upon such request. Written notice of the Commissioner's decision on any such request shall be given to the individual who made the request;

(C) to correct errors apparent on the face of such records;

(D) to transfer items to records of the Railroad Retirement Board if such items were credited under this subchapter when they should have been credited under the Railroad Retirement Act of 1937 or 1974 [45 U.S.C. 228a et seq., 231 et seq.], or to enter items transferred by the Railroad Retirement Board which have been credited under the Railroad Retirement Act of 1937 or 1974 when they should have been credited under this subchapter;

(E) to delete or reduce the amount of any entry which is erroneous as a result of fraud;

(F) to conform the Commissioner's records to --

(i) tax returns or portions thereof (including information returns and other written statements) filed with the Commissioner of Internal Revenue under title VIII of the Social Security Act, under subchapter E of chapter 1 or subchapter A of chapter 9 of the Internal Revenue Code of 1939, under chapter 2 or 21 of the Internal Revenue Code of 1954 or the Internal Revenue Code of 1986, or under regulations made under authority of such title, subchapter, or chapter;

(ii) wage reports filed by a State pursuant to an agreement under section 418 of this title or regulations of the Commissioner of Social Security thereunder; or

(iii) assessments of amounts due under an agreement pursuant to section 418 of this title (as in effect prior to December 31, 1986), if such assessments are made within the period specified in subsection (q) of such section (as so in effect), or allowances of credits or refunds of overpayments by a State under an agreement pursuant to such section;

except that no amount of self-employment income of an individual for any taxable year (if such return or statement was filed after the expiration of the time limitation following the taxable year) shall be included in the Commissioner's records pursuant to this subparagraph;

(G) to correct errors made in the allocation, to individuals or periods, of wages or self-employment income entered in the records of the Commissioner of Social Security;

(H) to include wages paid during any period in such year to an individual by an employer;

(I) to enter items which constitute remuneration for employment under subsection (o) of this section, such entries to be in accordance with certified reports of records made by the Railroad Retirement Board pursuant to section 5(k)(3) of the Railroad Retirement Act of 1937 [45 U.S.C. 228e(k)(3)] or section 7(b)(7) of the Railroad Retirement Act of 1974 [45 U.S.C. 231f(b)(7)]; or

(J) to include self-employment income for any taxable year, up to, but not in excess of, the amount of wages deleted by the Commissioner of Social Security as payments erroneously included in such records as wages paid to such individual, if such income (or net earnings from self-employment), not already included in such records as self-employment income, is included in a return or statement (referred to in subparagraph (F) of this subsection) filed before the expiration of the time limitation following the taxable year in which such deletion of wages is made.